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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. JAMES LYNTON WESSON, Defendant and Appellant.	C075971 (Super. Ct. No. MF036536A)

Defendant James Lynton Wesson stands convicted by a jury of one count of first-degree burglary. (Pen. Code, § 459; unless otherwise set forth, statutory references that follow are to the Penal Code.) The jury also found allegations that defendant had two prior serious felony convictions for first-degree burglary in 1993 and 1999 to be true. The prosecution dismissed allegations of prior prison terms. (§ 667.5.)

At sentencing, the court struck one of the two prior strike allegations for three-strikes sentencing purposes only, granting a defense request for a Two-Strikes, instead of Three-Strikes, sentence. (§ 1385.) The court sentenced defendant to 22 years in prison:

Six years, doubled (§§ 667, subd. (a), 1170.12, subd. (b)), plus two five-year enhancements for the two prior serious felony convictions (§ 667, subd. (a)).

On appeal defendant contends the trial court prejudicially erred by allowing defendant's post-arrest, post-*Miranda* silence to be used against him. Defendant also claims the prosecution committed prejudicial misconduct by arguing facts not in evidence, asserting reasonable doubt requires articulated reasons, improperly speculating on non-testifying witnesses' possible testimony, and by encouraging the jury to reach an emotionally-based verdict. Defendant also contends that counsel was ineffective for failing to object to evidence of defendant's speculation. We find counsel was not ineffective. We also find there was no reversible error in regards to the prosecution's conduct, nor the trial court's allowance of defendant's silence to be used in argument. We affirm the judgment.

FACTS AND PROCEEDINGS

Michael Gibbs and his son returned home on July 22, 2012, to find a hole cut in the security screen door and both the security screen door and the front door forced open. Gibbs went into the house and called the Tracy Police Department. Once inside the residence, he discovered his home had been ransacked and various personal items had been taken. Gibbs also noticed a blood stain in the entry hall of the house, about six feet away from the front door. Officer Joel Petty was the first to arrive at the Gibbs home and noticed cloth stuck in the cut portion of the screen door, suggesting the intruder's hand was covered. A crime scene technician was called to take samples from the home. One of the samples taken was a swab from the stain inside the entry of the hall, which was then taken to the Department of Justice (DOJ). This sample yielded a positive result for blood. The blood swab was then typed for DNA and resulted in a match to the DNA profile of defendant in a database. Subsequently, defendant provided a buccal swab sample that affirmed the DNA found at the Gibb's house matched that of defendant's

DNA. The DOJ determined that the statistical likelihood of the same DNA profile generated in this case occurring in two separate, unrelated people would be one in 1.3 septillion Caucasians (defendant's race).

Elimination samples were taken from the victims to rule out the blood sample as their own. A police department crime scene technician testified she made a mistake on the chain-of custody documentation, by writing that a victim's sample was released to the volunteer who delivered the sample to the DOJ Central Valley Lab, instead of stating the sample was released to the lab. All other documentation was filled out correctly. The DOJ stored and tested all DNA samples separately. The testing results eliminated the Gibbs' as possible matches to the DNA sample in evidence.

While obtaining defendant's DNA sample Detective Harries questioned defendant. Defendant denied ever being in the house and committing the burglary. Defendant said that he did not know how his blood ended up in the house, and when asked if someone could have set him up he responded that he could not think of anyone who would have set him up but it was possible he could have been set up.

DISCUSSION

I

Doyle Error

Defendant contends his conviction must be reversed because of "Doyle error" (*Doyle v. Ohio* (1976) 426 U.S. 610, 617-619 [49 L.Ed.2d 91, 97-98]) in that the prosecution used defendant's post-*Miranda* failure to deny guilt in a conversation with a jailhouse visitor as adoptive admissions, thereby penalizing an exercise of the right to remain silent under *Miranda v. Arizona* (1966) 384 U.S. 436.

About a year after the break in, a female visitor went to the jail and had a conversation with defendant. The conversation was recorded and played for the jury at

trial, the jury being told only that the conversation was recorded legally. During this conversation the woman yelled at defendant and repeatedly berated him to which he responded with various statements insinuating his guilt. The relevant record is as follows:

"[Visitor]: Do they have DNA?

"[Defendant]: Yeah.

"[Visitor]: Do they have DNA?

"[Defendant]: Yeah (in audible)

"[Visitor]: They do? Oh!

"[Defendant]: If I go to trial?

"[Visitor]: Wow wow wow, they do?

"[Defendant]: Yeah.

"[Visitor]: Oh. It's a rap then man. It's inside the house?

"[Defendant]: Yeah.

"[Visitor]: Stupid motherfucker I hate you!

"[Defendant]: Hey. I love you.

"[Visitor]: Fucked up.

"[Defendant]: Yeah fucked up.

"[Visitor]: *inaudible* and fucking went and got stupid. Kill you know what I am saying. *Inaudible* fucking retarded. So fucking retarded. How old are you? So fucking retarded.

"[Defendant]: Shut up man. C'mon.

"[Visitor]: So fucking retarded. So fucking retarded.

"[Defendant]: Do I need you to kick my ass?

"[Visitor]: So fucking retarded. So fucking retarded. It is. It's fucking retarded. It's nice but it's fucking retarded.

"[Defendant]: Hey.

"[Visitor]: You should be loving me instead of doing that dumb shit.

"[Defendant]: I know. Hey listen.

"[Visitor]: It's so fucking retarded.

"[Defendant]: LISTEN! They got me with the blood drop, okay?

"[Visitor]: What?

"[Defendant]: They got me with the blood drop, in the house, DNA, DNA."

The transcript contained typographical errors that "They got be with the blood drop. . . ." The trial court instructed the jury that the transcript was not evidence, and the audio recording controls. On appeal defendant acknowledges he said "me," which is consistent with our review of the audio recording.

The defense initially objected that the visitor's words and tone were irrelevant, and defendant's initial words were ambiguous. The court overruled the objection.

Before the recording was played for the jury, the defense objected that the female's foul language and vehemence was prejudicial, and her opinion that defendant did something wrong was irrelevant and inadmissible hearsay. The prosecutor argued the evidentiary value was to give context to defendant's response and failure to deny the accusation. The trial court ruled the evidence was admissible as a statement of party opponent and was more probative than prejudicial under Evidence Code section 352. The court stated it was not deciding whether defendant's response was an adoptive admission. The trial court gave the jury a limiting instruction that the female's remarks were not to be considered for the truth of the matter, but only to help understand defendant's words.

The trial court declined to instruct the jury on adoptive admissions, noting it required a finding that defendant heard and understood the female's statements but the recording was hard to understand in places. The trial court nevertheless said the prosecutor could argue the point to the jury, and he did so. In closing argument, the prosecutor said the female asked if the police had DNA, and defendant said yes, and "she

is clearly very shocked by this." The defense objected it was not relevant, and the trial court overruled the objection. At the next recess, the defense argued the prosecutor misused the female's words, tone, and opinion as evidence. The trial court was satisfied the jury was properly instructed on the limited use of the evidence. The instruction told the jurors they must decide whether defendant made any oral statement before trial, and if they find he did, they must decide how much importance to give it, but they must not give any consideration to, or use for any purpose, the statements, reactions, or opinions of the female on the tape.

While defense counsel argued hearsay, relevance and prejudice, no objection on *Doyle* grounds were made. Under these circumstances, defendant has forfeited any claim of *Doyle* error. (Evid. Code, § 353; *People v. Hughes* (2002) 27 Cal.4th 287, 332.) We decline defendant's invitation that we exercise our discretion to relieve him of the forfeiture.

Anticipating this conclusion, defendant asserts his attorney's failure to object constitutes ineffective assistance of counsel.

"When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. . . . On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked

for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation." (*People v. Mai* (2013) 57 Cal.4th 986, 1009 (*Mai*).)

Here, there was no *Doyle* violation because there was no improper use of the defendant's silence in the face of questioning by law enforcement authorities. His express and implied admissions to his jailhouse visitor came in and nothing more. Trial counsel was not ineffective for failing to object based on *Doyle*.

Even if *Doyle* applied to admissions made to third parties not acting on behalf of law enforcement, *Doyle* is not applicable here since defendant did not exercise his right to remain silent. Although the prosecution argued that defendant's failure to deny his visitor's accusations were adoptive admissions, defendant also made express admissions which clearly showed that defendant was not invoking his right to remain silent.

We conclude there was no *Doyle* error.

II

Ineffective Assistance of Counsel

Defendant contends he received ineffective assistance of trial counsel in counsel's failure to object to inadmissible evidence that defendant speculated to police that he could have been set up. (*Mai*, *supra*, 57 Cal.4th at p. 1009.)

The prosecutor questioned Detective Harries about his post-*Miranda* warning interview with defendant. Officer Harries testified:

"[Prosecutor]: Okay. Did you ask him if anyone were to set him up, something to that effect?

"[Officer Harries]: Yeah, I did.

"[Prosecutor]: What did he tell you?

"[Officer Harries]: He said he didn't know if somebody -- he said it's possible but he didn't know any specific person that he could think of that would set him up, but he said it was possible he could have been set up"

Defendant argues his speculation about being set up was inadmissible. He cites only inapposite federal Court of Appeals cases holding that the prosecution's *" 'were they [the defendant's accusers] lying' "* questions to a testifying defendant should not be permitted, because they are calculated to make the defendant look bad for accusing his accusers of lying. Defendant acknowledges the California Supreme Court has held that, while such questions are inadmissible when designed to elicit speculation, they are admissible if the witness has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 319.)

Here, defendant did not testify at trial but rather made his statement in response to a police question as to whether anyone could have set defendant up by planting his blood inside the victims' home. The question did not ask for defendant to accuse his accusers of lying. Moreover, the relevance of the answer was not in defendant's speculation that someone might have framed him, but rather in his admission that he could not think of anyone who might have framed him. Trial counsel was not ineffective in failing to object to this evidence.

Even if we were to conclude otherwise, defendant cannot demonstrate prejudice and thus cannot establish a viable claim of ineffective assistance of counsel. (See *People v. Scott* (1997) 15 Cal.4th 1188, 1211.) The evidence against defendant was overwhelming. Defendant's blood was found inside the house. Defendant denied ever being inside the house but provided no other reasonable explanation as to how his blood got there. Further, defendant's conversation with his visitor in jail provided the jury with express admissions of defendant's guilt with statements such as "they got me with the blood drop, in the house, DNA, DNA."

Given this evidence, there is absolutely no likelihood that a jury would have returned a different verdict even if the challenged evidence and argument had been

excluded. In sum, defendant has failed to establish he received ineffective assistance of trial counsel.

III

Prosecutorial Misconduct

Defendant contends the prosecutor committed prejudicial misconduct on numerous occasions during closing argument. First, defendant argues the prosecutor argued facts not in evidence. Second, defendant asserts that the prosecutor engaged in improper speculation regarding possible testimony of non-testifying witnesses. Thirdly, defendant contends that the prosecutor encouraged the jury to make an "emotionally-influenced verdict." Lastly, defendant asserts that the prosecutor improperly stated the reasonable doubt standard. We find no grounds for reversal.

Prosecutorial misconduct violates a defendant's federal constitutional rights when it comprises a pattern of conduct so egregious that it infects the trial with unfairness as to make the resulting conviction a denial of due process. (*People v. Bennett* (2009) 45 Cal.4th 577, 594-595 (*Bennett*).) Conduct that does not render a trial fundamentally unfair is error under state law only when it involves the use of deceptive or reprehensible methods to attempt to persuade the court or the jury. (*Ibid*.) Assuming misconduct, it does not require reversal absent prejudice to the defendant. (*People v. Cash* (2002) 28 Cal.4th 703, 733.) The federal standard is whether the misconduct was harmless beyond a reasonable doubt. (*People v. Williams* (2013) 58 Cal.4th 197, 274.) The state standard is whether it is reasonably probable the defendant would have obtained a more favorable result absent the error. (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1324.)

Each of these claims made by defendant even with misconduct assumed, do not amount to a reversible error.

A. Arguing Facts Not in Evidence

First, defendant claims that the prosecutor argued facts not in evidence. During argument the prosecutor made three statements at issue here. These statements are as follows:

"[Prosecutor]: Pretty much, 99 percent of the burglaries I would venture to say happen when the people are not home." The trial court overruled the defense objection, noting "It's argument."

"[Prosecutor]: Let's go to the reasonable explanations. In life, the truth lies 99 percent of the time or pretty much 100 percent of the time, the simplest, 100 percent of the time, the simplest logic is the one that actually leads to the truth." The court overruled the defense objection and admonished the jury: "Again, ladies and gentlemen, what the attorneys say is not evidence. There has been no evidence of percentiles of people telling the truth. It's just argument."

"[Prosecutor]: I just gave you how two of the major legal idioms came about, red herrings and barking up a wrong tree, both of these designed for one purpose, to convince you to let the defendant get away from -- get away free after committing this crime. Designed for that one purpose. Don't be fooled by that. [¶] For example, one of the arguments the defense made was she very cleverly used the beyond a reasonable doubt definition where it says everything used within human affairs are subject to some doubt, i.e., the argument being everything subject to human affairs is equal to some doubt, thus everything you heard here is subject to some doubt, thus don't find my client guilty. Okay? [¶] Don't fall for that. Here is why. First of all, the presumption of innocence actually ends at some point. It does not prevent you from finding the defendant guilty after hearing all the evidence. Counsel indicated that beyond a reasonable doubt standard is such a high standard that you have to break through the presumption of innocence. It is such a high standard that it is, even after I put on two of the most compelling evidence in

criminal law, DNA and the defendant's own statements, gee, you know, that's not enough. [¶] Well, folks, prisons are full. They pled guilty either because they were afraid we would meet the beyond a reasonable doubt or they went to trial and across the state juries found them guilty beyond a reasonable doubt." The trial court overruled the defense objection and stated "this is just argument. The attorneys' comments are not evidence."

Argumentative statements are appropriate during closing argument. A prosecutor's argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom. (*People v. Edwards* (2013) 57 Cal.4th 658, 736.) Even if we assume that these statements were improper, no prejudice resulted as the jury was repeatedly instructed that statements of counsel are not evidence. No prejudicial error is shown on this record.

B. Improper Speculation on Non-Testifying Witnesses' Possible Testimony

Second, defendant argues that the prosecutor committed misconduct by speculating what the testimony of non-testifying witnesses would have been, i.e., a volunteer (VIP) who transported a victim's blood sample from the police department to the DOJ crime lab. The prosecutor said, "And what would be the point of us putting the VIP's on? Here is what they are going to say, as you can tell. They take this evidence every day, up and down. Yes, we signed the paperwork. Yes, we picked it up, put it in the truck, and we drove it to [the] Department of Justice and we handed them over. Do you remember this specific evidence? Of course not. They are not going to remember that because there's nothing special about Mr. Wesson's case than any other, you know, hundreds of cases that, unfortunately, Tracy PD has to deal with. So again, red herrings designed to make you bark up the wrong tree."

" 'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant

[requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 427; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1204.)

Defense counsel did not contemporaneously object to these comments. Defendant contends that other similar instances of prosecutorial misconduct were summarily dismissed by the Court and therefore it would be pointless for defense counsel to object to prosecutorial misconduct. We disagree. This instance was very different from the others. Defendant has not made a convincing argument for defense counsel's failure to object. Nor is this a case of egregious misconduct triggering a duty sua sponte for the court to intervene, as argued by defendant. Thus, the claim is forfeited. Even so, on the merits defendant's claim fails.

Even assuming this issue is preserved for appeal and that the prosecutor's comments were improper, the error was nonprejudicial. This comment did not irreparably taint the trial. The chain-of-custody error related only to the *victim*'*s* blood sample taken for elimination purposes. There was overwhelming evidence against defendant therefore it is unlikely that these comments influenced the jury's decision. Thus, this error cannot be said to have denied defendant a fundamentally fair trial.

C. Encouraging Emotionally-Based Verdict

Third, the defendant contends the prosecutor encouraged an emotionally-influenced verdict with statements, "Don't let him get away with it. Please find him guilty" and "Mr. . . . Gibbs will probably never feel safe in that house ever again, so please uphold justice and find the defendant guilty, find him responsible for the crime that he committed." The trial court overruled defendant's objection to the first comment,

noting "It's argument." The defense did not object to the second comment, but we assume for purposes of this appeal that any such objection would have been futile.

Here, even if we were to assume for the sake of argument that the prosecutor crossed the line of a fair argument, and the trial court erred in allowing it, the prosecutors' arguable misconduct did not prejudice defendant.

Generally, a prosecutor may not invite the jury to convict based on emotion or sympathy for victims. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1406-1407.) *Leonard* stated a prosecutor committed misconduct by asking the jurors to imagine the thoughts of the murder victims in their last seconds of life, but the prosecutor's passing remark could not have prejudiced the defendant, given the overwhelming evidence of guilt. (*Id*. at p. 1407.)

Here, the prosecutor's comments were fleeting. The trial court specifically instructed the jurors, "Do not let bias, sympathy, prejudice, or public opinion influence your decision. . . ." Additionally, the jury was instructed, "If you believe the attorney's comments on the law conflict with my instructions, you must follow my instructions." The case against defendant was also strong -- including the blood containing defendant's DNA being inside the house. It is inconceivable that the jury convicted defendant based on the prosecutor's comments during argument. We are confident the jury was able to follow the court's instruction not to let emotions rule their decision. Therefore, defendant's claim is denied.

D. Asserting Reasonable Doubt Standard During Argument

Defendant asserts the prosecutor misstated the reasonable doubt standard during argument. Defendant interprets the prosecutor's argument as requiring jurors to articulate a reasonable explanation for reasonable doubt. The prosecutor argued, "[w]hat's the only reasonable explanation for this DNA match? It is not, gee, the two -- the sample and the control were -- well, here are not -- what are not reasonable explanations. Defendant was

walking by, he -- by the house, happened to cut his finger, blood squirted through the bathroom window and took a left turn and landed in the house on the same day it was broken into. Not a reasonable explanation. [¶] Okay. Remember how I told -- how I explained to you guys in voir dire, all doubts have to be reasonable. [¶] Another not reasonable explanation is this, they took the blood, they put it in the envelope and -- and put those two envelopes into another envelope, dried it and frozen, mind you, by protocol, and then they put it, all those envelopes into another large envelope, sealed it and sent it to Department of Justice. [¶] On the way, somehow, due to heat or just by being near some other DNA, kind of mor[ph]ed into the DNA of a guy who happened to live in Tracy. Not a reasonable explanation. [¶] Another reasonable explanation of that it is not is this, he had a twin brother who did the burglary. The state of the evidence is there was no twin brother. Did you hear any evidence that there was a twin brother? No. Another reasonable -- unreasonable explanation is that -- no, I can't really even come up with any more."

Defendant also has issue with the prosecutor's argument, "[w]hat do you think would have happened? Melinda Tankersley [police crime technician] brings it in, lets them dry in a place -- in a secure place. And since this is not the only case in Tracy, she goes out to do whatever else that she needs to do, comes back, and now that it's dry, puts it in the freezer. [¶] In the meantime, what could have happened? Defendant was walking by the Tracy police department, cut his fingernails, cut his finger and blood spurted out, and somehow wind blew it into that envelope? No."

We need not decide whether the prosecutor overstepped the bounds of permissible argument, because the error, if there was one, did not cause prejudice. The trial court instructed the jury that, "[t]he evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt." In addition the jury was specifically instructed, "when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

Finally, we reject defendant's argument that the evidence against him was not overwhelming. He argues that "jurors apparently did not consider this case iron-clad" based on the fact jurors deliberated for approximately five and a half hours over the course of two court sessions. He asserts that this was a credibility contest between defendant's denials versus a DNA analyst's conclusions and inferences from an emotionally-charged jail-visit recording. We find this argument unpersuasive. There was overwhelming evidence, including defendant's DNA being found inside the house. Defendant's reliance on a newspaper article for his assertion that DNA analysis is not infallible is not persuasive.

E. Conclusion

We conclude defendant's claim of prosecutorial misconduct fails since there was not prejudice warranting reversal. The misconduct, if any, was harmless beyond a reasonable doubt. In light of that conclusion, and the weight of the evidence against defendant, his claim of ineffective assistance of counsel must also fail, as there is no reasonable probability that he would have obtained a more favorable result absent counsel's shortcomings. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003, citing *Strickland v. Washington* (1984) 466 U.S. 668, 686 [80 L.Ed.2d 674].)

DISPOSITION

The judgment is affirmed.

HULL, Acting P. J.

We concur:

MAURO, J.

DUARTE, J., Concurring.

I concur in the result, but write separately because I respectfully disagree with portions of the analysis in Part III of the majority opinion.

First, from Part III(A), although the majority does not so hold, I believe the prosecutor's comments regarding the percentage of burglaries committed when a residence is occupied, as well as his comment as to why "the prisons are full" of people who pleaded guilty and the reasons behind their doing so, were neither fair comment on nor reasonable inference from the evidence.

"When the claim focuses on the prosecutor's comments to the jury, we determine whether there was a reasonable likelihood that the jury construed or applied any of the remarks in an objectionable fashion." (*People v. Booker* (2011) 51 Cal.4th 141, 184-185.) Here, because the jury was correctly instructed that argument was not evidence (and reminded multiple times by the trial court as it overruled defense counsel's many objections to the prosecutor's improper argument), there was no reasonable likelihood that the jury construed or applied any of the remarks in an objectionable fashion. Further, the evidence of defendant's guilt was substantial. I agree that no prejudice is shown on this record.

Second, from Part III(B), I disagree that the claim is forfeited for lack of objection by defense counsel, because I agree with defendant that given the trial court's cursory overruling of defendant's many objections to improper argument, any further objection to improper argument would have been futile. Reaching the merits on this particular claim of prosecutorial misconduct--that the prosecutor's argument engaged in improper speculation as to the probable testimony of non-testifying witnesses--the claim fails. There was no error because the prosecutor was merely summarizing the testimony already heard from another testifying witness as to the duties of the nontestifying witnesses. This type of argument--summarizing testimony already in evidence and drawing reasonable inferences therefrom--is permissible.

I agree that the judgment should be affirmed.

DUARTE, J.